

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-7101

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7101

B
p/s

MIRIAM WINTERS,

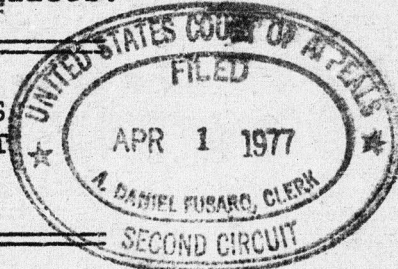
Plaintiff-Appellant,

-against-

ABE LAVINE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, EASTERN DISTRICT
OF NEW YORK



BRIEF FOR APPELLANT

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Original

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order of the statutory three-judge court below, dated January 31, 1977, the Hon. Paul Hays, C.J., the Hon. John Bartels, and the Hon. John Dooling, J.J., United States District Court for the Eastern District of New York, denying all relief demanded by Miriam Winters and abstaining from decision on her constitutional challenge to §365-a of the New York Social Services Law in respect to reimbursement

for the services of a Christian Science practitioner, while at the same time holding an adverse decision in state court under §365-a as to Christian Science nurses to be res judicata.

THE STATUTE INVOLVED

The statute involved in this suit, New York Social Services Law §365-a (McKinney's 1976), provides:

1. The amount, nature and manner of providing medical assistance for needy persons shall be determined by the public welfare official with the advice of a physician and in accordance with the local medical plan, this title, and the regulations of the department.
2. "Medical assistance" shall mean payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title, and the regulations of the department. Such care, services and supplies shall include, but need not be limited to:
 - (a) Services of qualified physicians, dentists to the extent authorized by paragraph (e) herein, nurses, optometrists, podiatrists and other related professional personnel;
 - (b) Care, treatment, maintenance and nursing services in hospitals, nursing homes, infirmaries or other eligible medical institutions, and health-related care and services in intermediate care facilities, while operated in com-

pliance with applicable provisions of this chapter, the public health law, the mental hygiene law and other laws, including any provision thereof requiring an operating certificate or license, or where such facilities are not conveniently accessible, in hospitals located without the state; provided, however, that care, treatment, maintenance and nursing services in nursing homes, including those operated by the state department of mental hygiene or any other state department or agency, shall be limited to one hundred days during any spell of illness for persons who are receiving or are eligible for medical assistance under provisions of subparagraph four of paragraph (a) of subdivision one of section three hundred sixty-six of this chapter, plus, with the prior approval of the commissioner of health upon the recommendation of the appropriate medical director, or with the prior approval of the commissioner of mental hygiene in the case of nursing homes operated by the state department of mental hygiene, such additional periods of time as may be necessary in cases of clear need for nursing services;

- (c) Out-patient hospital or clinic services in facilities operated in compliance with applicable provisions of this chapter, the public health law, the mental hygiene law and other laws, including any provisions thereof requiring an operating certificate or license, or where such facilities are not conveniently accessible, in any hospital located without the state;
- (d) Home health care services, including home nursing services and services of home aids and homemaker or housekeeping services in the recipient's home, if rendered by an individual other than a member of the family who is qualified to provide such services, where the services are prescribed by

a physician in accordance with a plan of treatment and are supervised by a registered nurse;

- (e) Preventive, prophylactic and other routine dental care, services and supplies;
- (f) Drugs, sickroom supplies, eyeglasses, and prosthetic appliances except dental prosthetic appliances; provided however that dental prosthetic and orthodontic appliances required to alleviate a serious health condition, including one which affects employability, may be furnished with prior approval in accordance with the regulations of the department;
- (g) Physical therapy and relative rehabilitative services;
- (h) Laboratory and x-ray services;
- (i) Transportation when essential to obtain care and services in accordance with this section, upon prior approval, except in cases of emergency;
- (j) Care and services furnished by a comprehensive health care organization to eligible individuals residing in the geographic area served by such organization, when such services are furnished in accordance with an agreement approved by the department which meets the requirements of federal law and regulations.

STATEMENT OF THE ISSUES

When a believer in Christian Science healing sought reimbursement under her Medicaid coverage for the cost of such treatment and was refused by the New York State Department of Social Services:

(1) Is her federal civil rights lawsuit barred on the one hand by res judicata because of the New York State courts' refusal to find constitutional merit in her claim for Christian Science nurse payments and simultaneously barred, on the other hand, by abstention when there are outstanding claims for payment for Christian Science practitioners, and does such a combination of procedural doctrines completely prevent access to federal courts directly offending the Constitution, the Civil Rights Act and public policy?

(2) Is denial of payment for healing because it is effectuated by "religious" means a violation of the First Amendment's freedom of religion?

STATEMENT OF THE CASE

Appellant Miriam Winters has been a follower of Christian Science beliefs and practices for over thirteen years. Because of her religious faith, she does not believe in using the services or treatment of the medical profession as practiced by "physicians" and "nurses." Miss Winters believes that any illness she may have can be cured by the treatments administered by Christian Science practitioners and nurses. The practice of eschewing conventional medical treatment is among the most fundamental tenets of the Christian Science faith.

Miss Winters was ill, periodically, from mid-1973 through 1974. During each period of illness she sought the services and treatment of Christian Science practitioners and

nurses, all of whom were certified by the First Church of Christ, Scientist, of Boston, Massachusetts.

Miss Winters submitted the bills for these services to the New York City Department of Social Services for payment by the state's Medical Assistance (Medicaid) Program. As a recipient of state public assistance and, since January 1, 1974, Supplementary Security Income, appellant is completely eligible for Medicaid benefits.

The first such request was made in a letter dated November 12, 1973 (A-98). In response to this letter, W.W. Kass, acting on behalf of the City of New York, rejected appellant's request for payment by Medicaid of bills totalling \$78.66 for treatments and supplies appellant received from a Christian Science nurse (A-99). A hearing to review this denial was held on December 18, 1973. The Decision After Hearing rendered on February 20, 1974, affirmed the Department's denial of such payments on the ground that payment was not authorized by New York Social Services Law §365-a. (A-101)

Appellant then appealed to the New York State Supreme Court for the County of New York, pursuant to Article 78 of the New York Civil Practice Law and Rules. Pursuant to the State's motion, this appeal was transferred by that court to the Appellate Division, First Department.

The Appellate Division, by decision dated October 16, 1975, affirmed the decision of the Department of Social Services denying Miss Winters' payment for her treatment by a Christian Science nurse. (A-108) Appeal was taken on constitutional

grounds to the Court of Appeals which dismissed the appeal sua sponte on the grounds of the lack of a constitutional question. (A-112)

The second request for payment by Medicaid of Christian Science treatments totalling \$90.00 was made in a letter dated December 21, 1973.* When appellees failed to respond to this request, appellant requested a hearing, which was held on March 7, 1974. The Decision After Hearing rendered on March 27, 1974 reversed the Department's decision and ordered it to pay the \$70.00 of the \$90.00 bill submitted by appellant.

(A-120) Only after appellees were threatened with a lawsuit to force compliance did they comply with the Decision After Hearing, by payment of \$70.00 in the first part of August.

(See, e.g. A-123.)

The third request was made in a letter from appellant's attorney, dated March 1, 1974, requesting payment totalling \$194.00 for Christian Science treatments rendered by Benjamin Rippe, C.S. (A-113). In a letter dated March 7, 1974, Dr. Lee B. Reichman, on behalf of the City of New York rejected this request (A-115). In response to a similar letter from appellant's attorney, dated March 12, 1974 (A-117), Phillip A. Roos, on behalf of the Bureau of Medicaid rejected the request in a letter dated March 21, 1974 (A-118).

A hearing to review these denials was held on May 9, 1974. The Decision After Hearing rendered on May 30, 1974,

*To keep the appendix short, some documents have not been included. They appear in the record of the court below.

affirmed the Department's denial of payment on the ground that New York Social Services Law §365-a does not include services rendered by a Christian Science practitioner. Article 78 proceedings to appeal this determination in New York State Supreme Court were filed but have not been pursued since the 3-judge panel was convened.

Appellant made a fourth request for payment of Christian Science treatments amounting to \$56.00 in a letter to both Dr. Lee B. Reichman, and Phillip A. Roos. As of the date this complaint was filed in this court and until now, defendants had failed to answer this letter.

Prior to the commencement of this suit, appellant incurred additional bills totalling \$33.00 for Christian Science treatments. In light of her experience with appellees' repeated denial of Medicaid reimbursement, appellant made no request for payment of this bill and instead initiated this proceeding in the United States District Court.

On September 15, 1975, a 3-judge panel was ordered convened by Judge Bartels (A-25). Argument and briefs were had before the statutory court, and decision was rendered on July 21, 1976, with Judges Hays and Bartels holding the claim for nursing reimbursement was barred by res judicata and the claim for practitioner barred by abstention. (A-34) Judge Dooling concurred as to the nursing care and dissented as to practitioners arguing that since they weren't licensed, their bills weren't entitled to reimbursement (A-73). On August 10, 1976, the attorney for Miriam Winters sent the panel a letter suggesting that abstention was no longer appropriate since sub-

sequent to the 3-judge panel argument the highest court in New York had dismissed the constitutional claim (A-126). By a phone call counsel was informed that the abstention only applied to practitioners and even though it was the identical statute, the court would continue to abstain on the constitutional issue of payment for Christian Science treatment.

A Notice of Appeal to the Supreme Court of the United States was filed on September 15, 1976 (A-128). On December 13, 1976, the Supreme Court ordered that the judgment of July 21, 1976 be vacated, the case remanded and a fresh decree entered (A-130). On January 31, 1977, the 3-judge court signed a new order embodying the same decision as the prior judgment of July 21, 1976 (A-131). A Notice of Appeal to this Court was filed on February 18, 1977 (A-133).

It is from the order and judgment of January 31, 1977, and the original opinion and decision of July 21, 1976, that Miriam Winters now appeals.

ARGUMENT

I

This Federal Suit Is Not and Should Not
Be Barred By Either Res Judicata, Abstention,
Or Their Combination

Federal courts exist to provide federal remedies against federal wrongs. Foremost in this field of protection are constitutional rights. See Bell v. Hood, 327 U.S. 678 (1946). The numerous Civil Rights Acts have been enacted specifically

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to protect individual constitutional rights. This civil rights case is about one of those important constitutional rights: freedom of religion. The appellant rightfully sought relief in a federal forum but was denied access by the mistaken invocation of two exceptions to this general principle applied jointly in a self-contradictory manner. These exceptions to the general rule of access to the courts will be discussed separately and in combination.

(i)

Res Judicata

The District Court's ruling that Miss Winters could not launch a constitutional attack on the denial by appellees of Medicaid payment for the services of a Christian Science nurse because the appellant fully litigated her constitutional claim in state court and was therefore estopped by the doctrine of res judicata from relitigating the issue in a federal forum is clearly wrong, both on the law and the facts. It is absolutely clear that, although appellant might have raised the issue of unconstitutionality as to §365-a of the New York Social Services Law (McKinney's 1976) in her Article 78 proceeding, in fact the state courts never adjudicated, decided, ruled on, or in any way addressed that issue. The Appellate Division, First Department, of the New York Supreme Court based its decision denying reimbursement for Christian Science nursing care on the grounds that "there is insufficient [evidence] in the record to indicate either the nature of her illness or of the treatment which she received." Winters v. Commissioner of the

New York State Department of Social Services, 49 A.D.2d 843, 373 N.Y.S.2d 604, 605 (1st Dept. 1975) (A-111). On appeal, the New York Court of Appeals dismissed sua sponte for the reason that "no substantial constitutional question is directly involved." Winters v. Commissioner of the New York State Department of Social Services, No. 457 SSD 34 (Apr. 29, 1976) (A-112).

The question raised by this case is thus not whether prior Article 78 judgments are generally given res judicata effect by the New York courts -- that principle is almost too plain to require discussion. The question posed here is whether in this case, given these particular facts, the state courts' denials of Medicaid reimbursement for Christian Science nursing care should be held conclusive as to appellant's First Amendment objections to Soc. Serv. Law §365-a (McKinney's 1976). Indeed, this Court has stressed that a careful inquiry must always be made before barring a federal action under 42 U.S.C. §1983(1976) on the grounds of res judicata:

The demonstrated reluctance of the New York courts to give their prior decisions res judicata effect should weigh heavily in our consideration of that issue since we are not bound to give a state court decision any greater res judicata effect than would the rendering court itself. ... In Civil Rights Act cases such as this, brought under 42 U.S.C. §1983, the policy of favoring the federal forum, ... should make us especially careful to ascertain precisely what effect the state courts would give to their own prior judgments.

McCune v. Frank, 521 F.2d 1152, 1156 (2d Cir. 1975).

The 3-judge Court below held that "[u]nder New York law a final judgment on the merits in an Article 78 proceeding is conclusive as to the rights of all parties, or their privies, to the litigation with respect to all issues actually raised and litigated even if not decided by the court."

Winters v. Lavine, No. 74 C 1703 (E.D.N.Y., July 21, 1976) (3-judge court) (emphasis supplied) (A-48, 49 & fn. 7). But the authorities cited by the court do not clearly support such an extensive proposition. In Island Park Taxpayers & Property Owners Association, Inc. v. Sacino, 42 A.D.2d 729, 345 N.Y.S. 2d 664 (2d Dept. 1973), the court reached the unobjectionable conclusion that the petitioners there could not challenge in a second Article 78 proceeding the very same decision of a zoning appeals board which they had unsuccessfully attacked in a prior Article 78 action eight years before. In that case, then, the congruity of issues as actually resolved in the two lawsuits was obvious.

Similarly, Searles v. Main Tavern, Inc., 28 A.D.2d 1136, 284 N.Y.S.2d 652 (2d Dept. 1967), and Motor Vehicle A.I. Corp. v. National Grange M.I. Co., 26 A.D.2d 6, 270 N.Y.S.2d 245 (1st Dept. 1966), aff'd, 19 N.Y.2d 115, 278 N.Y.S. 367, 224 N.E. 2d 869 (1967), do not address the precise aspect of res judicata raised by this case. In Searles, supra, the court found that a successful motion to dismiss an Article 78 petition on jurisdictional grounds was really a dismissal for failure to state a cause of action. But in so finding, the court concluded that the merits of the case had not been ad-

dressed in the prior proceeding, and in fact allowed the plaintiff to bring an independent action on the same facts. See also Schifano v. Schifano, 329 N.Y.S.2d 776 (2d Dept. 1972) (per curiam). And in Motor Vehicle Accident Insurance Corp., supra, the court merely reiterated the long-accepted rule that a prior judgment is only res judicata as to the parties actually involved in the previous action.

Those authorities, then, are wholly inapposite where the facts of the case clearly indicate that the state courts did not adjudicate or decide the constitutional issues, but instead explicitly refused to reach them "on the record." Cases such as Grubb v. Public Utilities Commission, 281 U.S. 489 (1930); Lecci v. Cahn, 493 F.2d 826 (2d Cir. 1974); and Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), which indicate that it is irrelevant for purposes of res judicata analysis whether all grounds for decision are actually mentioned in an opinion, are all cases where the courts did in fact consider the constitutional objections and incorporated them in their rulings, at least sub silentio. Such is plainly not the case in this instance.

The close factual analysis for which appellant argues is supported by this Court's general approach in the application of res judicata to cases brought under 42 U.S.C. §1983 (1976). To begin with, the Supreme Court has never squarely decided the question whether res judicata is applicable to such statutory civil rights cases. See Preiser v. Rodriguez,

411 U.S. 475 (1973). The Courts of Appeal have thus been free to answer the question on their own, and have generally done so in the affirmative. This Court, "[w]hile treating the problem more as one of waiver than as *res judicata*...has [agreed] by way of dicta...." Winters v. Lavine, No. 74 C 1703 (E.D.N.Y., July 21, 1976) (3-judge court) (A-47). Indeed, that "dicta" suggests that the question is more properly analyzed in terms of collateral estoppel or issue preclusion rather than the less discrete doctrine of *res judicata*. See Lombard v. Board of Education, 502 F.2d 631, 636-637 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); Thistlethwaite v. City of New York, 497 F.2d 339, 345 (2d Cir.), cert. denied, 419 U.S. 1093 (1974).

Thus, in Newman v. Board of Education, 508 F.2d 277 (2d Cir.), cert. denied, 420 U.S. 1004 (1975), this Court relied on the principle of collateral estoppel that there must actually be a determination of the issue in question, and that the decision must have been necessary for the final outcome. Restatement (Second) of Judgments, §68h (Tent. Draft No. 1, 1973). In Newman, supra, this Court found that the New York Supreme Court's opinion did not reflect any constitutional claims, and in fact "specifically went off on other considerations." 508 F.2d at 278. This was so even though the plaintiff had in that case also raised a constitutional claim in her state court petition.

Analogously here, in her state court action, appellant alleged a violation of her First Amendment right to exercise

her religious preferences, as recognized and protected in Sherbert v. Verner, 374 U.S. 398 (1963). But that assertion was made in the context of her claim for benefits under state statutory law. The mere raising of constitutional claims in the context of a state court proceeding is not sufficient to preclude appellant from asserting her right more fully in a federal forum. Indeed, in Government and Civic Employees Organizing Committee, C.I.O. v. Windsor, 353 U.S. 364 (1957) and again in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), the Supreme Court has recognized the necessity, in many cases, of asserting constitutional issues so that a state statutory claim can be decided by a state court in proper perspective. A holding that appellant's assertion of her constitutional right in the state court, required to give that court a complete picture, should now bar federal adjudication of that right is to force appellant onto a tight-rope impossible of a successful traverse. And to hold that appellant is now barred from federal court because of the citation of constitutional authority in her state court brief (see A-50 & fn. 8), when that authority was plainly and explicitly never considered, flies in the face of the substantial federal policies underlying civil rights actions under 42 U.S. §1983 (1976).

The opinion of the Appellate Division does not mention any constitutional issue. In fact, that Court disposed of the case by accepting respondent's position in its brief in opposition that the record was insufficient to demonstrate appel-

lant's entitlement to benefits. (See A-108) Respondents contended "the record provides no basis for reviewing respondent State Commissioner's decision, and the purported constitutional issue is not properly before the Court." (Respondents' brief to the Appellate Division, p. 7). Furthermore, in their state court brief respondents also asserted that appellant's constitutional challenge should be heard by the federal district court, i.e. the court below:

Since petitioner challenges the Decision After Hearing under the Federal Constitution (Brief, Point II) and it is clear that the decision is in accord with the Federal Regulation, the petition implicitly challenges the constitutionality of that Regulation. This contention is for the United States District Court of New York where petitioner's independent action, Winters v. Lavine, 74 C 1703, is now sub judice. (Respondents' brief, p. 8)

The Appellate Division apparently adopted this reasoning in holding, as related above, that the record was insufficient to establish appellant's entitlement to benefits. It would be most unfair and ironic to conclude that despite the respondents' consistent contention that the constitutional issue was not even properly before the State Court and should be in federal court, the issue was sufficiently litigated in State Court to preclude assertion in the federal court, even after the Appellate Division denied the existence of any constitutional issue and the Court of Appeals dismissed sua sponte on the claimed absence of any constitutional issue.

The rights federal courts protect are crucial to the Constitution and central to the federal judiciary's concerns. Res judicata is a doctrine used to prevent multiplicity of litigation. It should not be mistakenly imported to prevent the federal court's proper functioning to protect essential constitutional rights.

(ii)

Abstention

It has long been settled that the theoretical existence of a state court remedy does not bar the immediate filing and adjudication of a federal Civil Rights Act case to protect constitutional rights. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). In this case one State court action was filed but not pursued and another claim brought to State court attention, but never adjudicated.

The 3-judge Court held, in contradiction to the Appellate Division's holding, that the constitutional question was presented to the Appellate Division, considered and ruled on. The appeal to the Court of Appeals was dismissed for lack of a constitutional question. If this denial of a constitutional question was a ruling on the constitutional merits, then to demand abstention until those courts rule on the unconstitutionality of §365-a becomes patently absurd. The state courts have already refused to hear appellant's constitutional claim

even though she has offered them the opportunity to construe the statute. This fact was pointed out to the 3-judge panel. (See A-126)

Rarely has a case been less susceptible to abstention. The central claim is purely constitutional; the legislative lynchpin is federal. Three federal judges have heard the arguments and read the briefs. The statute of which MISS Winters complains makes no distinction on its face between reimbursement claims for Christian Science nursing care and those for practitioners, and the state agency has refused both claims on the same grounds of "non-listing." Thus, by refusing to adjudicate the nursing care claim, the state courts have effectively refused to entertain the practitioner claim as well. The constitutional challenge and therefore jurisdiction and the merits are identical for each of the two claims for Medicaid reimbursement.

Moreover, since the court below must hear the constitutional claim as to Christian Science nursing care (if it is not barred by res judicata, as is argued above), it would be an unnecessary waste of judicial time not to consider the practitioner claim at the same time. It is also exhausting both the appellant and her remedies to compel her to pursue through the state courts the same constitutional claim which they have already rejected, either by refusing to reach it or by apparently deciding it in the same manner as the 3-judge court below. Here, then, where a crucial constitutional right is at stake, the federal courts should act now to protect it.

(iii)

The Deadly Combination

The decision indicates the dilemma now faced by litigants because of the conjoint application of the doctrines of res judicata and abstention. See, e.g. Younger Grows Older: Equitable Abstention in Civil Proceedings, 50 N.Y.U.L. Rev. 870, 913-915 (1975). The horns of the dilemma are particularly sharp when, as here, the State prescribes a short statute of limitations for the bringing of an action.

New York law allows only four months to commence an action to review a determination by a state officer or agency. N.Y.C.P.L.R. §217 (McKinney's 1963). This brief time is insufficient (as it was here) to allow a litigant to initiate a federal court action, receive a decision of abstention, and commence a state court proceeding reserving the federal issues as suggested in England v. Louisiana State Board of Medical Examiners, supra. Due to the short statute of limitations, a litigant desiring a federal decision may be compelled, as appellant did here, to commence lawsuits simultaneously in both state and federal courts. Since the state action was not commenced at the suggestion of an abstaining federal court, appellant could not confidently "reserve" her federal claims. The failure to assert those claims in some manner in the state proceeding could have had three consequences. Firstly, the traditional version of res judicata could have been applied in federal court precluding appellant from litigating any claim she raised or could have raised in the state court proceeding as may have happened here. Secondly, the failure to raise the

claim in some manner would have run afoul of Government and Civic Employees Organizing Committee, C.I.O. v. Windsor, supra. Third, the most effective and properly advocated case would not have been presented in state courts to the detriment of the client.*

Needless to say, it is impossible for the claim rejected at a hearing and not made subject to an Article 78 review to be ever presented to the State Court. It is time-barred as appellant's time expired waiting for the decision. Clearly, abstention is inappropriate for that claim. Taking the safest course, appellant protected her rights by filing in both courts and tripped, nevertheless, over the procedural roadblocks. Firstly, her State court action in which she attempted to acquire a statutory interpretation was held to preclude litigation of her federal claim. Then, incongruously enough, appellant was greeted simultaneously with abstention on the theory that there was no state court interpretation of her statutory claim. When she went to State court, the result was that the decision obtained was held to bar her federal action. When she didn't go, she was told she was barred because she hadn't. All she wants is "one" day in court to raise her constitutional claims where they will actually be heard and hopefully adjudicated in a substantive manner consistent with their importance. It is to the nature of those claims and the underlying constitutional rights that this argument now turns.

II

Refusal To Reimburse For Christian Science Healing Treatments Violates The Constitutional Command Of Religious Freedom

Miriam Winters fell ill. Pursuant to her beliefs, she utilized a Christian Science practitioner and, under his directions, a Christian Science nurse. They submitted bills to her, some of which she paid. She then sought reimbursement for four bills, and, being denied payment for three, instituted this suit for their payment.

The applicable federal statute authorizes payment for "medical assistance." 42 U.S.C. §1396 et seq. (1976). It specifically recognizes that treatment pursuant to the precepts of the Christian Science Church can be reimbursed as such by reference to the sanatorium and nurses.

Yet, Miriam Winters was denied payment for the assistance she received pursuant to Christian Science religion and practices, the results of which the medical profession would consider "medical." Such a denial violates the Constitution's command of freedom of religion. It also misconstrues the meaning of "medical assistance."

As detailed in the opinion of Judge Dooling, concurring and dissenting below (A-73), there are a broad range of reimbursable expenditures including podiatrists, home aides, and psychiatrists.* The only group that appears to be excluded

*Contrary to the thrust of Judge Dooling's opinion and as the court was informed, not all people practicing "psychotherapy" are required to be licensed. Under New York law, anyone can hold himself out to practice psychotherapy and some indeed do -- people who believe that they can help, various grad-

are Christian Science practitioners and nurses.

Christian Science, according to its dogma, heals by prayer. However, this practice and method should not condemn it. What for the religious person may appear as prayer and a cure from God may appear to a non-believing medical observer as psychiatric practice. So too the reverse: for a Christian Scientist, treatment by what they characterize as "materia medica" has no effect at all so that any improvement can only be understood and explained by their religious tenets. Just because Christian Scientists characterize some of their healings as "prayer" and doctors some of theirs as "chemo-therapy" doesn't mean either should be denied Medicaid reimbursement. A fortiori, when the reason for denial is that such healing was done by "prayer," the First Amendment freedom of religion man-

[fn. cont'd] uates of social work schools, graduate school programs, and M.D.'s with no psychological training at all. On the other hand, Christian Science practitioners have to be licensed by the church. (One wonders if some of the psychotherapists do anything differently from a Christian Science practitioner who talks to the believer about troubles perceived as non-bodily in nature.)

Even if Christian Science practitioners and nurses were excluded on the basis of failure to possess normal healing licenses, this just translates the constitutional defect to another forum. Can the State insist on licensing or refusing to license a practitioner of a healing art where the religion connected to the healing art prohibits such supervision or licensing? It should be noted that the category for reimbursement is not a narrow one, such as only M.D.'s but rather a whole range of "healing arts," including anything which can be labeled "clinical psychology." Title 18 N.Y.C.R.R. §526.

Sums paid to Christian Science practitioners are deductible medical expenses for IRS. (See A-77) Christian Scientists wealthy enough to pay taxes have their medical expenses subsidized by the state; only the poor Christian Scientist is denied payment for using a Christian Science practitioner. Cf. Harper v. Virginia Board of Education, 383 U.S. 663 (1966).

dates the unconstitutionality of the refusal to reimburse.

The dissent suggests that payment may create establishment problems. Clearly not. Miriam Winters exercised her free choice of healing (as the statute as well as the First Amendment permits). She now seeks reimbursement for the expenses of such a choice. The fact that she chose what for her was "religious" is irrelevant to the neutral nature of the reimbursement. In Everson v. New Jersey, 330 U.S. 1 (1946), where the State paid students' carfare to go to parochial schools (with the possibility of reimbursement for carfare for others who went to non-public schools), the court held there was no establishment of religion but rather assistance of freedom of choice. See for a fuller analysis, Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 Yale L.J. 593, 612-618 (1964). A fortiori, payment for healing choices characterized by some as "religious," made from among many such alternatives, cannot be conceived of as an establishment of religion. Instead, to deny her benefits because she followed her religion is unconstitutional. Sherbert v. Verner, supra.

Finally, the Constitution compels a statutory interpretation. "Medical assistance" must include healing by Christian Science, for to exclude it would violate the Constitution. (Judge Dooling's opinion suggests the State could indeed license practitioners and nurses for the sole purpose of reimbursement (A-95-96).) Such a reading of §365-a, coupled with the statutory requirement giving recipients a "free choice of

providers," mandates payment to Miriam Winters for her Christian Science treatment.

CONCLUSION

For all of the reasons stated above, the judgment of the court below should be vacated and this case remanded for consideration of the constitutionality of §365-a of the New York Social Services Law.

Respectfully submitted,

JONATHAN A. WEISS
LEGAL SERVICES FOR THE
ELDERLY POOR
Attorney for Appellant
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MIRIAM WINTERS,

Plaintiff-Appellant,

-against-

ABE LAVINE, individually and as Com-
missioner of the New York State
Department of Social Services; and
JAMES R. DUMPSON, individually and
as Commissioner of the New York
City Department of Social Services,

Defendants-Appellees.

AFFIDAVIT OF
PERSONAL SERVICE

Index No. 77-7101

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DENNIS R. PEARSON, being duly sworn, deposes and says:

1. That he is not a party to this action, that he is
over the age of 18 years, and that he resides at 201 E. 10th
Street, #7, New York, New York 10003.

2. That on the 1st day of April, 1977, he served the
within Brief for Appellant, and Appendix, on LOUIS J. LEFKOWITZ,
Attorney General, State of New York, 2 World Trade Center, New
York, New York 10047, Attention: MARY ELLEN WEINBERG, Esq.; and
W. BERNARD RICHLAND, Corporation Counsel, City of New York, 1656
Municipal Building, New York, New York 10007, Attention: KEVIN
SHERIDAN, Esq., attorneys for defendants-appellees, by personally
delivering the requisite copies thereof at the offices and ad-
dresses herein named.

Sworn to before me this
1st day of April, 1977

Andrew Paul Zweben

ANDREW PAUL ZWEBEN
Notary Public State of New York
No. 31-9315530
Qualified in New York County
Commission Expires March 30, 1978

Dennis R Pearson
DENNIS R. PEARSON

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐

Certification
By Attorney

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

☐

Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

☐

Individual
Verification

the

being duly sworn, deposes and says: deponent is

in the within action; deponent has read

and knows the contents thereof; the same is true to

the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.

☐

Corporate
Verification

the

of

a corporation,

in the within action; deponent has read the

and knows the contents thereof; and the same

is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐

Affidavit
of Service
By Mail

On

19

deponent served the within

upon

attorney(s) for

in this action, at

the address designated by said attorney(s) for that purpose

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐

Affidavit
of Personal
Service

On

19

at

deponent served the within

upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir: Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named Court on 19

Dated,

Yours, etc.,

LEGAL SERVICES FOR THE ELDERLY POOR

Attorney for

Office and Post Office Address, Telephone

2095 Broadway—Suite 304

Borough of Manhattan New York, N. Y. 10023

(212) 595-1340

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,

LEGAL SERVICES FOR THE ELDERLY POOR

Attorney for

Office and Post Office Address, Telephone

2095 Broadway—Suite 304

Borough of Manhattan New York, N. Y. 10023

(212) 595-1340

To

Attorney(s) for

Index No. 77-7101

Year 19

UNITED STATES COURT OF APPEALS
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Plaintiff-Appellant,

-against-

ABE LAVINE, individually and as
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as Commissioner of the New York City
Department of Social Services,

Defendants-Appellees.

AFFIDAVIT OF PERSONAL SERVICE

JONATHAN A. WEISS
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(212) 595-1340

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for